Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

(2)

No. 04-1506

In The Supreme Court of the United States

ARKANSAS DEPARTMENT
OF HUMAN SERVICES, et al.,

Petitioners,

vs.

HEIDI AHLBORN,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT'S BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 42 U.S.C. § 1396p(a)(1) permits a state Medicaid program to appropriate a recipient's monetary recovery upon a claim arising out of personal injury beyond the extent to which it represents compensation for past medical expenses.

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STATEMENT OF THE CASE

Respondent Heidi Ahlborn (Ahlborn) sustained serious personal injuries in a motor vehicle accident, resulting in extensive medical treatment and significant permanent disability. She was determined to be eligible for Medicaid benefits which were provided by the Petitioner, Arkansas Department of Human Services (DHS), the state agency responsible for the administration of the Medicaid program. Arkansas law required Ahlborn to assign to DHS her "right to any settlement, judgment or award" that she might receive from responsible third parties "to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant." Ark. Code Ann. § 20-77-307(a).

Ahlborn, by way of a compromise settlement, recovered $550,000.00 in insurance and tort claims. It was stipulated by DHS and Ahlborn that a reasonable value of her total claim, absent considerations of liability, was $3,040,708.12. (Petition App. 2) The components of her claim under Arkansas law included compensation for past and future medical care expenses, loss of earnings, impairment of earning capacity, pain and suffering, and permanent impairment disability. (Petition App. 17)

DHS provided Medicaid benefits on behalf of Ahlborn in the amount of $215,645.30 for which it asserted a lien against Ahlborn's settlement pursuant to Ark. Code Ann. § 20-77-301 – § 20-77-313(2-3). (Petition App. 18) Controversy developed between Ahlborn and DHS as to the permissible extent of the state's right of recoupment, which lead to the filing of this declaratory judgment action in the district court.

Ahlborn contended that 42 U.S.C. § 1396p(a)(1) (commonly referred to as the anti-lien statute) prohibits the imposition of a lien "against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan[.]", and therefore DHS's statutory right of reimbursement was limited to that portion of the lump-sum settlement which fairly represented the past medical expense component of the recovery. The parties stipulated that if Ahlborn was correct DHS would be limited to recovering $35,581.47 (Petition App. 19), the amount of the percentage of the settlement fairly attributable to the past medical expense component of her claim.

DHS contended that, by reason of the statutory assignment, Ahlborn's claim in its entirety did not become her property until the Medicaid lien was satisfied and therefore there was no conflict with the anti-lien statute.

Before the district court, DHS and Ahlborn filed competing motions for summary judgment, upon which DHS prevailed. *Ahlborn v. Arkansas Dept. of Human Serv.*, 280 F.Supp.2d 881 (E.D. Ark. 2003). The Eighth Circuit Court of Appeals reversed the summary judgment and directed entry of judgment for the stipulated amount of the settlement attributable to the claim for medical expense. *Ahlborn v. Arkansas Dept. of Human Serv.*, 397 F.3d 620 (8th Cir. 2005). DHS now petitions this Court to issue a writ of certiorari to the Eighth Circuit Court of Appeals in order to review that decision.

SUMMARY OF ARGUMENT

DHS petitions this Court to issue a writ of certiorari in order to review *Ahlborn* first because of a supposed conflict between it and other federal and state court opinions. The conflict, however, that DHS advances is one of primarily differing end results rather than one of contrary interpretations of an issue of federal law. This federal law question is the extent to which 42 U.S.C. § 1396p(a)(1) (the anti-lien statute) limits the power of a state Medicaid program to appropriate the claim of, or proceeds from, a monetary recovery obtained by a Medicaid recipient from a third party tortfeasor. This precise issue of federal law was addressed by only two of the state cases, offered as conflicting decisions. In each of those, the analysis of the majority opinion of the court was superficial and premised upon faulty logic.

Rather than being a contrary interpretation of federal law, *Ahlborn* is entirely consistent with the only other reported decision based on an in-depth analysis of the statutory language. Because of the impaired precedent value of the judicial interpretations of the federal law question differing with *Ahlborn*, they should not be regarded as presenting a significant conflict. Accordingly, the conflict upon which DHS seeks issuance of certiorari is not substantial and does not rise to the level justifying a grant of certiorari.

DHS next contends that *Ahlborn* fails to give *Chevron* deference to administrative agency interpretations with which it is alleged to be in conflict. *Chevron* deference is not appropriate because there is no ambiguity in the statutory language. Absent ambiguity in the meaning of a statute, applying customary tools of interpretation, resort

to agency interpretations is neither required nor warranted. In any event, the administrative interpretations upon which DHS relies do not address the federal law question presented in *Ahlborn*. As is true with the majority of the judicial determinations, the conflicting interpretations of the anti-lien statute do not exist. Certiorari upon this basis is not appropriate.

A third basis upon which DHS seeks issuance of a writ of certiorari is the existence of an important question of federal law that should be settled by this Court. This contention assumes that there is something unsettled about the present statutory interpretations. This does not exist. The statutory language is, as found by the Eighth Circuit in *Ahlborn*, rather straightforward and is unambiguous in its meaning. *Ahlborn* provides a thorough analysis of the statutory language, and reaches the correct conclusion. Therefore, there does not exist an unsettled question of federal law which needs to be the subject of this Court's resources.

Contrary to DHS's assertion, the question resolved by *Ahlborn* is not of widespread significance. It arises only in those instances where a Medicaid recipient is, for any reason, unable to recover a substantial part of the medical expenses incurred by reason of an injury caused by tortious conduct. There is nothing in the record to suggest that this is a situation which arises with a frequency justifying this Court's involvement.

The final basis that DHS advances for the issuance of certiorari is the supposed effect upon the funding of the Medicaid program. Mechanics of funding of programs is not a function of the judiciary, but is a legislative matter. What DHS really takes issue with is not *Ahlborn* but the

decision of Congress, as to how the competing interests of the Medicaid program and the property rights of its beneficiary should be resolved. If the determination of Congress, embodied in the statutory language, is not desirable as a matter of policy, then it is for Congress to make that adjustment.

The core issue of DHS's petition is the assumption that *Ahlborn* was wrongly decided. This is a false assumption. *Ahlborn* is clearly a correct reading of the statutory language and reaches a result which those provisions clearly mandate. Whether the anti-lien statute is out of harmony with the overall scheme of the social legislation is not a matter of judicial concern. The only question is what does the clear statutory language mean in this context, which has been unequivocally and correctly answered in *Ahlborn* and therefore further judicial review is unnecessary.

ARGUMENT

Preface

A petition for the issuance of a writ of certiorari addresses the sound discretion of this Court. Because the judicial resources of any court are finite, and because of the sheer numbers of petitions for certiorari submitted to this Court, it has been recognized that "a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. In order to identify those cases worthy of its review, the Court has identified certain criteria, articulated in Rule 10, two of which are relevant here to the reasons asserted in DHS's petition. The issuance of a writ of certiorari may be appropriate when a court of appeals' decision is in

conflict with another court of appeals' opinion on an important matter, where it conflicts with a state court decision on an important federal question, Sup. Ct. R. 19(a), or where a court of appeals' decision addresses an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 19(c).

While all questions are important to the parties, there are few that rise to the level of importance that present the requisite compelling reasons for the granting of a writ of certiorari, all of which, for purposes of this case, turn upon two questions. First, is the precise issue of federal law in a state of uncertainty, either by reason of conflicting judicial interpretation of the statute in issue or because of the vagueness of statutory language, of a magnitude that requires it to be settled by this Court? Is this a question of federal law of widespread application or frequent recurrence, or is it an issue which arises only in narrow and limited circumstances?

Before turning to the specific arguments by DHS, an analysis of the issues, and of the Eighth Circuit's resolution of these, will be helpful. At the heart of the issue are competing interests of the Medicaid program's right of recoupment and the recipient's property interest. This conflict has been resolved by Congress in the statutes creating and defining the Medicaid program. By enactment of the anti-lien statute, 42 U.S.C. § 1396p(a)(1), Congress has prohibited the states from imposing liens upon the property of a living Medicaid recipient. The identification of what is "property" is not addressed by statute, but is by default left to state law to define. Here the applicable state law clearly holds that "the right to sue for damages is property," *Gregory v. Colvin*, 235 Ark. 1007, 1008, 363 S.W.2d 539, 540 (1963), as the Eighth Circuit

observed. *Ahlborn*, 397 F.3d at 624. Therefore, Ahlborn's claims arising out of her personal injuries were property to which the protection afforded by the anti-lien statute applies. Included within a claim arising out of a personal injury are a number of components, or elements which were identified in the district court opinion. (Petition App. 17) In terms of the common idiom which describes property as a "bundle of sticks", *e.g.*, *United States v. Craft*, 535 U.S. 274, 278 (2002), these elements of damage constitute the property interests created by the right to sue for damages. One of the sticks is the right to compensation for medical expenses.

Because of her personal injury, Ahlborn thereby acquired a property. By the enactment of the anti-lien statute, Congress has determined that the states should be precluded from seeking reimbursement from the property of a living recipient. As the Eighth Circuit held, the anti-lien statute "generally prevents a state from attaching property of a recipient to reimburse the state for benefits made under a Medicaid program." *Ahlborn*, 397 F.3d at 623. Thus, the general rule is that a living recipient's property is shielded from the state's right of reimbursement.

Congress, however, also mandated that the state's Medicaid plans must make provision for the acquisition of certain rights of the beneficiary to reimbursement, which provisions are obvious exceptions to the protection of the anti-lien statute. 42 U.S.C. § 1396a(a)(25)(H) requires that the state have in effect laws under which it is deemed to have acquired the rights of the recipient "to payment by the other party for such healthcare items and services." By 42 U.S.C. § 1396k(a)(1)(A), Congress mandated that the state require, as a condition of receiving benefits, assignment by

the recipient if "any rights . . . to payment for medical care from any third party." It is apparent, therefore, that an exception is created by these provisions, to the general protection afforded the "bundle" by the anti-lien statute. The scope of the exception to the general rule of protection, however, is limited by the express terms of the exception. Those terms limit the exception to only one stick; the "rights . . . to payment for medical care . . . " 42 U.S.C. § 1396k(a)(1)(A).

These statutory provisions were harmonized by the Eighth Circuit where it held:

> "We believe a straightforward interpretation of the test of these statutes demonstrates that the federal statutory scheme requires only the state recover payments from third parties to the extent of their legal liability to compensate the beneficiary *for medical and services* incurred by the beneficiary."

Ahlborn, 397 F.3d at 625. The Eighth Circuit then concluded that the Arkansas statutes that required an assignment of the entire cause of action against the third party tortfeasor to "conflict with and frustrate . . . [the] federal scheme." *Ahlborn*, 397 F.3d at 628.

As the Eighth Circuit correctly held, these statutory provisions clearly set forth a general rule of protection of the recipient's bundle coupled with an exception expressly limited to one stick. There is no uncertainty in the state of the law as regards the application of the anti-lien statute, 42 U.S.C. § 1396p(a)(1), in the context of tort claims of recipients. As the Eighth Circuit correctly observed in *Ahlborn*, the statutory language of the anti-lien statute, coupled with that of the provisions authorizing the state

Medicaid program to attach funds received as compensation for medical expenses, achieves a "harmonious scheme" of "plain meaning." *Ahlborn*, 397 F.3d at 626. Nor is there substantial uncertainty in decisional law, or administrative interpretations. The "conflict" authorities raised by DHS are clearly distinguishable since, as discussed *infra*, with two exceptions, none of these discuss the precise federal question presented here, *i.e.*, the application of the anti-lien statute. The two state cases that address this do so in a cursory manner which saps them of any significant precedent value upon this issue. Therefore, importance of this issue, in the sense of providing a compelling reason for certiorari, cannot be based upon a chaotic state of law.

Neither is this an issue of widespread significance. It arises only in instances of large damages where, as here, the recipient's ability to recover is significantly compromised by liability factors, lack of financial resources of the tortfeasor, or both. Unlike issues of eligibility of the recipient or coverages of specific services, which no doubt arise with daily frequency, the ramifications of the anti-lien statute in the context of third party recoveries is of a far more narrow nature.

The right of the Medicaid program to recoupment payments, made for medical benefits, and the property rights of its beneficiaries present an obvious case of competing interests. Congress has clearly resolved this conflict by clear statutory language correctly interpreted by the Eighth's Circuit's opinion in *Ahlborn*. There is, therefore, no compelling reason presented here for the issuance of a writ of certiorari.

A. Certiorari Is Not Appropriate Because Of Any Conflict Between *Ahlborn* And Other Decisions

A conflict *per se* between *Ahlborn* and other decisions does not of itself justify the issuance of a writ of certiorari. A more relevant question than whether there is a conflict of judicial opinions is that of the quality of the conflicting opinions, and the degree of uncertainty in the state of the federal law thus generated. While diametrically opposing results constitute a conflict, that should not create a state of uncertainty where one line of authority is based upon flawed logic, superficial consideration, or failure to give effect to statutory language of clear meaning. The existence of decisions opposing *Ahlborn* should not be a basis for review if an examination of the rationale of the conflicting decisions gives clear indication that they reach the wrong result and that *Ahlborn* represents the more fundamentally sound analysis of the statutory language. The mere existence of a scattering of inadequately reasoned opinions should not justify review of an unquestionably correct decision. The question of whether certiorari should be granted should turn on whether *Ahlborn* is correct.

1. The Utah And Washington Decisions Which Conflict With *Ahlborn* Are Fundamentally Unsound; The New York Case Does Not Address The Anti-Lien Statute

While DHS proclaims that *Ahlborn* is in conflict with decisions of New York, Utah and Washington which directly address the effect of the anti-lien statute, 42 U.S.C. § 1396(a)(1), (Petition 17), that is not entirely true. While the Utah and Washington decisions mention the anti-lien statute, the New York opinion on the scope of lien, *Calvanese v. Calvanese*, 93 N.Y.2d 111, 688 N.Y.S.2d

479, 710 N.E.2d 1079 (1999), did not consider the anti-lien statute, or the limitations it places upon the state's power to appropriate the Medicaid recipient's claim arising out of personal injuries. Therefore, only the Utah and Washington cases discussed below can be said to present a true conflict with *Ahlborn*.

The Utah decision, *Houghton v. Department of Health*, 2002 Ut. 101, 57 P.3d 1067 (2002), *cert. denied*, 538 U.S. 945 (2003), and the one from Washington, *Wilson v. State*, 142 Wash.2d 40, 10 P.3d 1061 (2000), all share the common analytical error of begging the question. In each of the decisions, the court's rationale assumed the validity of the state statutes which appropriated the entire claim of the Medicaid recipients who had been tortiously injured. The reasoning followed by each was that, by reason of statutory assignment, the state intercepted the claim between the tortfeasor and recipient before the claim or proceeds therefrom became the recipient's property, and therefore there was nothing for the anti-lien statute to protect.

This reasoning is patently fallacious. The question is not whether the state had effectively, by statute or other mechanism, appropriated the entire claim, but whether Congress had allowed this to be done. Rather than addressing the first question, that is, whether 42 U.S.C. § 1396p(a)(1) permitted the state to appropriate the entire claim by statute or other means, the courts assumed the validity of the appropriation. That, of course, is the question to be answered.

By assuming the validity of the preemptive strike against the recipient's entire cause of action, the courts failed to recognize, or at least give effect to, the statutory

limitations of 42 U.S.C. § 1396a(a)(25)(H) and § 1396k(a)(1)(A), both of which are limited to the recipient's right "to payment for any other party for such health care . . . " or "to payment for medical care." This is the only stick the state is allowed to take.

Because of the failure of these decisions to deal with the fundamental question, their precedent value is minimal. While they do conflict with *Ahlborn*, because of the flawed reasoning, as compared with the thorough analysis of the Eighth Circuit, the conflict is minimal. Rather than presenting a substantial conflict, these two decisions are more in the nature of bugs on the windshield.

Calvanese, as noted above, does not address the anti-lien statute. While it relies upon *Cricchio v. Pennisi*, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301 (1997), which did address the anti-lien statute, it did so in the context of whether the state's right of recoupment could be circumvented by a transfer to a special-needs trust. *Cricchio* expressly left open the question of the scope of the state's right of recovery. *Cricchio*, 90 N.Y.2d at 309-310, 660 N.Y.S.2d at 684, 683 N.E.2d at 306. As a consequence, *Calvanese* does not present a true conflict with *Ahlborn* as regards the federal question; it is essentially a state statutory construction case.

2. *Ahlborn* Is Not In Conflict With The Second Circuit Decision Or That Of The North Dakota Court

While DHS asserts that *Ahlborn* is in conflict with the decision of the Second Circuit in *Sullivan v. County of Suffolk*, 174 F.3d 282 (2nd Cir. 1999), *cert. denied*, 528 U.S. 950 (1999), and of the North Dakota Court in *Grey Bear v.*

North Dakota Dept. of Human Serv., 2002 N.D. 139, 651 N.W.2d 611 (2002), the conflict is as the end result and not upon the federal law question presented by 42 U.S.C. § 1396p(a)(1). Neither opinion even mentions the anti-lien statute and accordingly does not present a conflict with *Ahlborn* on the federal law question.

Sullivan was, like *Norwest Bank of North Dakota v. Doth*, 159 F.3d 328 (8th Cir. 1998), and *Cricchio*, a case where the issue was whether the state's right of recoupment could be defected by a transfer of proceeds from the tortfeasor to a trust. The Second Circuit held that the Medicaid lien took precedence and therefore could not be avoided by this means. Actually, the state in *Sullivan* stipulated to a significant reduction in its lien and therefore the court refused to order a hearing on allocation. *Sullivan*, 174 F.3d at 286. As an aside by footnote in dictum, the court did say that the state lien extended to the entire claim, citing *Calvanese*, which did not consider the implications of the anti-lien statute. *Id.*, n.5. Therefore the footnoted dictum can hardly be said to conflict with *Ahlborn* on the federal law issue.

Grey Bear also failed to consider the limitations imposed by the anti-lien statute and in fact is only a state statutory construction case. It does not, therefore, present a conflict with *Ahlborn* on the federal statutory construction issue.

DHS acknowledges that the anti-lien statute was not raised in either *Sullivan* or *Grey Bear*, but argues that the "reasoning readily transfers to the anti-lien statute." (Petition 16) How the reasoning of a case that does not address the statutory language transfers to an interpretation of the meaning of the words is an unexplained mystery. What is

clear, however, is that these are not cases construing the same statute as *Ahlborn* and therefore do not present a conflict.

3. *Ahlborn* Is In Harmony With The Decisional Law Of The Minnesota Supreme Court

As DHS currently observes, *Ahlborn* is in total harmony with the decision of the Minnesota Supreme Court on the interpretation of the federal statutory provisions, *Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002), *cert. denied*, 539 U.S. 957 (2003). *Martin* is, in fact, the only decision other than *Ahlborn* which fully analyzes and harmonizes the statutory provisions reflecting Congress' balancing of the state's rights of recovery and the property rights of the Medicaid beneficiaries. The logic and analysis of the statutory language by both *Martin* and *Ahlborn* are impeccable. No doubt, a review by this Court will simply reaffirm the trenchant analysis of the Eighth Circuit in *Ahlborn* and therefore is entirely unnecessary.

4. Summary

Upon close examination, the conflict posited by DHS between *Ahlborn* and decisional law of other jurisdictions evaporates. Only two of the cases address the anti-lien statute, 42 U.S.C. § 1396p(a)(1), and therefore present a conflict on the federal question. The analyses of both are fatally flawed and therefore should not be deemed a substantial conflict justifying this Court's attention. The remaining cases do not address the statutory interpretation and therefore do not present a conflict at all. *Ahlborn* provides clear guidance to the interpretation of the statutory scheme which, although prolix, is stated unambiguously in

plain language. There is no uncertainty which this Court needs to settle.

B. Certiorari Is Not Appropriate Because Of Asserted Conflict Between *Ahlborn* and Interpretations Of The United States Department Of Health And Human Services

DHS seeks to justify a grant of certiorari because of a conflict it contends exists between *Ahlborn* and interpretations by the United States Department of Health and Human Services (HHS). A conflict between a decision of a United States Court of Appeals and an agency interpretation is not one of the considerations for review by certiorari enumerated in Rule 10 of the Court's Rules. In any event, the HHS interpretations upon which DHS relies, like some of the cases which have reached an inconsistent result, failed to take into account 42 U.S.C. § 1396p(a)(1) and its implications upon the scope of the state's rights of recovery and therefore do not present a conflict as to *Ahlborn* on the statutory interpretation issue. Furthermore, there is no ambiguity in the language of the applicable statutes and thus there is no need for the courts to look to an administrative agency to determine what the language means.

1. HHS Determinations Are Neither Entitled To Judicial Deference Nor Do They Conflict With *Ahlborn*

DHS contends that certiorari is appropriate because of the conflict between the position of *Ahlborn* and administrative interpretations by HHS. This contention, of course, argues that the Eighth Circuit did not give appropriate

deference to the administrative agency's determination. Contrary to this contention, the Eighth Circuit's opinion in *Ahlborn* is entirely consistent with this Court's definitive statement of the agency deference rule in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). There the Court unequivocally held that the administrative deference rule has no applicability when the statutory language is free from ambiguity. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. More recently the Court held that "[w]e only defer, however, to agency interpretations of statutes that, applying the normal 'tools of statutory construction', are ambiguous." *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001).

In *Ahlborn*, the Eighth Circuit, using the normal tools of statutory construction, found there to be no ambiguity in the relevant statutes, and therefore deference to the agency interpretation was not appropriate. The Court held:

> "[T]he principles of deference apply only when a statute is ambiguous and the agency advances a reasonable interpretation of the statute. In this case, we reject the agency's interpretation as inconsistent with the plain language."

Ahlborn, 397 F.3d at 626.

Ahlborn is entirely consistent with the rule of *Chevron* and its progeny. By the plain language of the anti-lien statute and the statutes authorizing appropriation of the recipient's claim against a third party tortfeasor for expenses arising out of medical services, Congress has

clearly resolved the competing interests of the Medicaid program and its beneficiary. Having clearly stated its resolution by the statutory language, "that is the end of the matter." *Chevron*, 467 U.S. at 842. In this particular circumstance, Congress has not "explicitly left a gap for an agency to fill", *id.* at 843, but rather has spoken directly to the issue.

The agency interpretations upon which DHS predicates a conflict with *Ahlborn* are markedly different from those in issue in *Wisconsin Dept. of Health & Family Serv. v. Blumer*, 534 U.S. 473 (2002). In that case, the issue concerned the definition of available resources. Congress explicitly delegated authority to prescribe the appropriate standards for that determination to the administrative agency, by 42 U.S.C. § 1396a(a)(17)(B). *Blumer*, therefore, is an instance where Congress "explicitly left a gap for an agency to fill." *Chevron*, 467 U.S. at 843. By contrast, here Congress has, by unambiguous language, expressly delineated the scope of the state's authority to appropriate the recipient's property.

Even if it be assumed that *Chevron* deference should be given to the agency determinations, there still would be no conflict with *Ahlborn* since the two administrative adjudications exhibited with DHS's petition for certiorari do not consider 42 U.S.C. § 1396p(a)(1), and the limitations which it imposes. There is no conflict with *Ahlborn* since they do address the same issues. Both the California adjudication (Petition App. 68-86) and the later Washington matter (Petition App. 45-67) focus entirely upon the respective state's obligations to pursue recovery, but did not consider the limitations Congress has placed on those efforts by enactment of the anti-lien statute. Like some of the cases discussed, *supra*, only a part of the statutory

provisions was examined. Therefore, since the adjudications do not consider the statutory construction issue, upon which *Ahlborn* is based, there is no conflict, other than as to the end result. *Ahlborn* presents a complete statutory analysis which, for whatever reason, was not done in the agency adjudications.

2. HHS's Interpretative Memorandia Is Not Entitled To *Chevron* Deference

The other administrative materials submitted by DHS with its petition (Petitioner's App. 87-91) are interpretative memorandia which do not rise to the level required for *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576 (2000). There the Court held:

> "Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-like deference."

Id. at 587. The agency documents upon which DHS relies (Petition App. 87-91) are precisely the kind of writing which *Christensen* and the cases cited therein describe as not warranting deference under *Chevron*.

C. Certiorari Is Not Appropriate Upon The Basis Of An Important Question Of Federal Law That Should Be Settled By This Court.

DHS contends that *Ahlborn* presents an important question of federal law that should be settled by this Court. Implicit in that contention is the assumption that there is something unsettled about the state of law, with which *Ahlborn* takes exception. This question has long

since been settled by Congress, and the resources of this Court are not needed to stamp an imprimatur upon the plain meaning of the statutory language. As the opinion in *Ahlborn* ably demonstrates, the respective rights and liabilities of the Medicaid program and its beneficiaries, in the context of tort claim recoveries, have been clearly defined by Congress and therefore there is nothing that needs to be settled.

What DHS deems evidence of there being an unsettled question are the court decisions and administrative adjudications which have failed to consider the entire statutory scheme, including the anti-lien statute, or which are based upon faulty and incomplete analyses. There are two extant opinions which fully analyze the statutory language, *Ahlborn* and the earlier Minnesota decision in *Martin*. Rather than involving the Court at this point, the better course of action would be to see whether, in view of the guidance of the Eighth Circuit's thorough analysis in *Ahlborn*, a true conflict develops. If, over time, a number of courts, after studied analysis of the statutory language interpreted by *Ahlborn*, reach a different conclusion, then perhaps a resolution by this Court is warranted. At this time, it is not.

1. This Case Does Not Present A Question Of Significant National Importance

DHS justifies its characterization of the question as being important, in part, because of funding needs. (Petition 27) The funding of Medicaid, or any other program, is not, however, a judicial function. It is a function of the courts to interpret the statutes and not to enact or amend them. If this is truly the important issue that DHS contends it to be,

and if Congress agrees that its present balancing of the competing interests of the Medicaid programs and the property rights of its beneficiaries are inappropriate, then it may amend the statutes.

DHS contends that its position makes perfect sense. (Petition, 28) Like beauty, what makes perfect sense is a matter of one's perspective. While subsidizing the Medicaid program by seizing upon the recipient's property understandably makes perfect sense to DHS, quite the contrary is true when viewed from the recipient's viewpoint. If the legislative objective was to maximize the filling of Medicaid's coffers, at the expense of the recipients, then one must wonder why Congress determined that a general rule against levies upon recipients' property, as embodied in the anti-lien statute, should be enacted.

What does make perfect sense, that is what has a degree of symmetry, is the statutory scheme as interpreted by the Eighth Circuit in *Ahlborn*. Medicaid pays for medical services required by reason of injury caused by tortious conduct. To the extent the injured party is able to extract a recovery of those expenses, Medicaid gets paid back. This is the scheme that would appear to make perfect sense, more so than the position advocated by DHS. In some cases, the position taken by DHS would mean that the tort victim's claim would inure only to the benefit of DHS and the victim's lawyers, an end result entirely possible under the Arkansas statute. *See* Ark. Code Ann. § 20-77-303 (Repl.2001).

Ahlborn is applicable only in those limited circumstances where, because of liability considerations, lack of sufficient insurance coverage upon or financial resources of the tortfeasor, the recovery upon the medical expense

component of the recipient's claim is not sufficient to cover the Medicaid lien. Because of the limited instances where this will arise and, in view of the well-reasoned construction of the statute by the Eighth Circuit, this is not a question of that degree of importance that merits this Court's review.

2. *Ahlborn* Decision Does Not Misinterpret The Medicaid Law

DHS argues that the Eighth Circuit in *Ahlborn* misinterpreted the federal Medicaid law because it is perceived to be inconsistent with the generalized payer of last resort concept. Statutes, however, must be interpreted and given effect according to the plain import of the statutory language. It is not appropriate to disregard specific statutory language because of a perceived inconsonance with a generalized theme. The goal of statutory interpretation is to determine legislative intent based upon obvious meaning of statutory language, and it gives the statute its intended effect. As the Court has held, "it is a basic principle that statutory language is to be enforced according to its terms." *Arkansas v. Farm Credit Serv. of Central Arkansas*, 520 U.S.821, 827 (1997).

Where statutory provisions are clearly and unambiguously stated, that ends the matter. It is not appropriate to torture the language of specific statutory provisions in the name of some generalized purpose of a larger legislative scheme. The argument advanced here by DHS was put before the Court in the context of another comprehensive statutory enactment in *Cooper Indus. Inc. v. Aviall Serv., Inc.*, ___ U.S. ___, 125 S.Ct. 577 (2004). In rejecting this argument, the Court held in language apropos here:

> "Given the clear meaning of the text there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.' *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 . . . (1998)."

Cooper at 125 S.Ct. 584.

While facially DHS assails the well-reasoned opinion of the Eighth Circuit in *Ahlborn*, what it really seeks is a judicial rewriting of the statutory language. *Ahlborn* is the messenger, not the message. Courts, however, interpret and apply statutes rather than rewriting them. An appropriate answer to DHS's position is set forth in *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984), where the Court stated:

> "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."

Ahlborn correctly interprets and applies the anti-lien statute and those accompanying statutes providing an exception thereto in the context of recoupment of benefits from the proceeds of a claim for medical expenses against a tortfeasor or other liable party. The analysis of the Eighth Circuit of the statutory provision is well reasoned and reaches the result mandated by the plain meaning of the statutory language. Therefore, certiorari is not justified to review a fundamentally sound decision.

CONCLUSION

There is no basis for the issuance of a writ of certiorari for review of the Eighth Circuit's decision in *Ahlborn*. The significance of the conflict between *Ahlborn* and other cases and agency interpretations asserted by DHS evaporates upon close examination. That conflict is largely as to results, which is not the relevant inquiry. This Court is not concerned with the ultimate results. It is whether there are different interpretations of an issue of federal law that determines whether the issuance of a writ of certiorari in order to resolve the question is warranted. The federal law issue is the application of the anti-lien statute in the context of a Medicaid recipient's tort recovery.

Of the purported conflicting authority, this federal law question has been addressed by only two state cases, the analyses of which are both cursory and flawed to the point that, as to this issue, these decisions present only a *de minimis* conflict.

Implicit in DHS's position is the suggestion that the anti-lien statute is antithetical to the Medicaid program in the context of personal injury recoveries. If that is the case, it is a matter for Congress, not the Court, to address.

DHS asserts that *Ahlborn* was wrongly decided, which is not accurate. In the *Ahlborn* opinion, the Eighth Circuit carefully examined the statutory language and reached the conclusion which it clearly mandates. *Ahlborn* and the Minnesota case are the only extant definitive analyses of the federal law issue presented by the anti-lien statute, both of which reached the right conclusion. Further review is, therefore, not needed.

Ahlborn respectfully submits that the petition for writ of certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

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